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Promotion of truth, justice, reparation and guarantees of non-recurrence

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, in accordance with Human Rights Council resolution 18/7.

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Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

Summary

In his first report to the General Assembly, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence highlights the ways in which the promotion of truth, justice, reparation and guarantees of non-recurrence, conceived as a set of mutually reinforcing measures, contribute to strengthening the rule of law. He draws attention to the weaknesses of purely formal conceptions of the rule of law, emphasizing that transitional justice measures must be conceived and established in a manner compliant with the rule of law if they are to be sustainable rights-enhancing instruments.

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I. Introduction

1. In the present report, his first to the General Assembly, submitted pursuant to Human Rights Council resolution 18/7, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence discusses transitional justice[1] and the rule of law in the light of the important discussion on the rule of law at the national and international levels taking place at the sixty-seventh session of the Assembly and the Assembly's encouragement, in paragraph 11 of its resolution 66/102, to the Secretary-General and the United Nations system to accord high priority to rule of law activities.

2. The Special Rapporteur highlights the ways in which the implementation of truth, justice, reparations and guarantees of non-recurrence following gross violations of human rights or serious violations of international humanitarian law contributes to strengthening the rule of law. He uses the experiences of countries that have implemented such measures to draw attention to the weaknesses of purely formal conceptions of the rule of law, emphasizing that transitional justice measures must be conceived and established in a manner compliant with the rule of law if they are to be sustainable rights-enhancing instruments.

II. Scope of the mandate

3. The mandate of the Special Rapporteur, as established by the Human Rights Council in its resolution 18/7, is to deal with situations in which there have been gross violations of human rights and serious violations of international humanitarian law. The Council focused on measures intended to promote truth, justice, reparations and guarantees of non-recurrence and mentioned, specifically, individual prosecutions, reparations, truth-seeking, institutional reform and vetting of public employees and officials, or an appropriately conceived combination thereof.

4. The Council emphasized the importance of a comprehensive approach that included the four elements of the mandate with a view to, among other things, restoring the rule of law and attaining other closely related goals. As framed in the resolution, the elements are intended to ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law in accordance with international human rights law.

III. Concept of the rule of law

5. Processes of State formation go hand in hand with processes leading to the consolidation of power, a connection that inevitably generates the risk of the predatory or otherwise abusive exercise of State power. The historical core of the

[1] As in his first report to the Human Rights Council (A/HRC/21/46), the Special Rapporteur uses herein the expression "transitional justice" to denote the comprehensive approach to the implementation of the four measures referred to in resolution 18/7. The term does not refer to a special kind of justice, and even less a form of soft justice, but to a strategy for the realization of the rights to justice, truth, reparations and guarantees of non-recurrence in the aftermath of gross violations of human rights and serious violations of international humanitarian law.

idea of the rule of law therefore centres on the need and the means to restrain such exercise. Various traditions have spelled out the ultimate justification for establishing such limits differently, while appeals have been made to the notions of rights, dignity and autonomy, and to instrumentalist considerations such as predictability and certainty, both for individuals and for collectivities.

6. The distinct but complementary means of constraining State power under the general category of the rule of law have become familiar. The first is a series of ex ante requirements for the exercise of power: no organ of the State can exercise power except on the basis of rules. Two ideas are of note here. One is the scope of the aspiration: all organs and actions of the State must have a certain characteristic, namely, being regulated. No one is above the law. In this sense, the rule of law is different from what historically was called "the rule of man". The second idea specifies that the relevant means of constraining State power is laws. Mere regulation by arbitrary decisions is insufficient.

7. If successfully implemented, even these general requirements imply significant progress in the protection of persons, for they prevent rulers from governing on the basis of whim. This alone greatly increases predictability and the margin for decision-making on the part of the governed. Many forms of arbitrariness are reduced through the adoption of these constraints on State power. The idea of the rule of law, however, its porous borders notwithstanding, is much more stringent than this. The rules that constrain State power need to be of general application, publicly promulgated, prospective, intelligible, consistent, practical or satisfiable (i.e. they cannot demand what cannot be done), stable and congruent.[2]

8. The second kind of constraint on power is a class of provisions to deal ex post with the exercise of power, allowing for the application of laws to be contested. The idea of the rule of law calls for the establishment of a complex set of institutions and procedures, including an independent and impartial judiciary that treats like cases alike and scrupulously observes guarantees of due process.

9. Courts under the rule of law are not merely norm-applying organs that determine the legal situation of individuals in a binding way, unlike secret military tribunals that may apply secret statutes, give the accused no hearing, not weigh evidence and that are not obligated to provide the reasoning for their decisions. The process of reaching decisions (involving hearings in which evidence duly gathered and made available to all parties is presented, giving parties the right to contest issues both of fact and of relevant law, and assessed by impartial and independent actors, leading to argued decisions grounded in general, public, clear and non-retroactive laws) has long been recognized as essential to the rule of law. The rule of law emphasizes the importance of courts not simply because of their output (binding decisions based on rules). Rather, it "frames, sponsors, and institutionalizes" a "culture of argument" not for the sake of argument, but as a measure of respect for human beings.[3]

10. Indeed, the rule of law is not equivalent to rule by law. While the history of its emergence is part and parcel of the process of consolidating State authority, the rule

[2] To use the list of formal characteristics of laws in Lon Fuller, *The Morality of Law*, revised ed. (New Haven, Connecticut, Yale University Press, 1969).

[3] Jeremy Waldron, "The concept and the rule of law", *Georgia Law Review*, vol. 43, No. 1 (2008), p. 56.

of law does not designate simply a behaviour-eliciting model of social control, but rather a valuable mode of governance that guides actions. The provisions at the heart of the concept of the rule of law are intended to express this difference. Accordingly, the requirements of generality, publicity, clarity, systematicity or integrity of laws, and their orientation to the public good, are expressions of the conditions under which authority can be exercised in ways that engage, rather than bypass, the rational capacity for agency.

11. Three ideas, then, are a core part of the classical notion of the rule of law: the regulation of power, equality before the law and the significance of judicial processes. While it holds true that there is a coercive dimension to the law, most prominent in criminal procedures, even (or, perhaps, in particular) there the capacity of law to engage the rational agency of parties is crucial to any understanding of the rule of law.[4]

12. While the academic debate among defenders of formalist and substantive conceptions of the rule of law has greatly waned, although perhaps not concluded, the United Nations system, throughout all its organs, has clearly opted for a rich understanding of the notion that refers to human rights, including a wide catalogue of political rights and, among them, democratic rights, the promotion of development and good governance. In the World Summit Outcome, Heads of State and Government recommitted themselves to actively protecting and promoting all human rights, the rule of law and democracy and recognized that they were interlinked and mutually reinforcing and that they belonged to the universal and indivisible core values and principles of the United Nations (General Assembly resolution 60/1, para. 119). In its resolution 57/221, on strengthening of the rule of law, the Assembly made a direct link between governance, rule of law, human rights and development (para. 7). Most recently, the Assembly adopted two resolutions, 65/32 and 66/102, in which it underlined the importance of implementing the rule of law at both the national and international levels, and called upon the United Nations system to mainstream the participation of women in rule of law activities.

13. In its resolution 19/36, on human rights, democracy and the rule of law, the Human Rights Council reaffirmed a robust understanding of the rule of law, not only asserting the interdependence of the terms in the definition, but also stressing, among other things, the relevance of the rule of law to peace, development and social cohesion (premised on gender equality and the elimination of all forms of discrimination).

IV. Transitional justice and the rule of law

A. Claims of relevance

14. That transitional justice can contribute to strengthening the rule of law has become commonplace in the literature and the practice (both local and international) of transitional justice. The Special Rapporteur is interested in understanding that contribution by highlighting some relevant examples and working towards

[4] See also Jürgen Habermas, *Between Facts and Norms* (Cambridge, Massachusetts, MIT Press, 1996), p. 448.

enhancing its potential in various contexts, as expressed in the implementation strategy for the mandate (see A/HRC/21/46, paras. 47-59).

15. To illustrate the prevalence of the view that transitional justice can contribute to the rule of law, virtually all truth commissions to date (such as those in El Salvador, Liberia, Morocco, Peru and South Africa) have used the concept of the rule of law both in an explanatory role (lack of respect for the principles of the rule of law is a factor leading to the rights violations under scrutiny) and as an object of their work (their recommendations are intended to strengthen the rule of law). Scholars largely agree on both the centrality of the concept and the usefulness of transitional justice measures in efforts to re-establish the rule of law. The Special Rapporteur outlines herein some of the contributions of transitional justice to the rule of law.

16. The United Nations system as a whole has adopted the view that transitional justice can contribute to strengthening the rule of law and has therefore made it an important element of its rule of law efforts, as shown by the significant number of resolutions adopted by the Security Council, the General Assembly and the Human Rights Council in which they consider both thematic issues and country situations, and the considerable number of related reports by the Secretary-General and the United Nations High Commissioner for Human Rights.

17. It is noteworthy that the most prevalent definition of the rule of law within the United Nations system was laid down, precisely, in a report of the Secretary-General to the Security Council on the rule of law and transitional justice (S/2004/616, para. 6). The rule of law is conceived as:

> "A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

18. Transitional justice consistently figured as a core element of the framework for strengthening the rule of law proposed by the Secretary-General in guidance notes in 2008 and 2010. This remains unchanged in his most recent report to the General Assembly on this topic (A/66/133), in which he refers to transitional justice processes and mechanisms (in addition to constitution-making, law reform, electoral assistance and guarantees, capacity-building of justice and security institutions and engagement with civil society) as the essential elements of the Organization's framework for engagement in the rule of law sector.

19. Beginning with resolution 1040 (1996), in respect of the situation in Burundi, and in numerous resolutions since then concerning countries undergoing transitional processes, the Security Council has called for the restoration and maintenance of the rule of law and established peacekeeping mandates with rule of law components that include the implementation of transitional justice measures, in, among others, Afghanistan (resolutions 1401 (2002) and 2041 (2012)), Côte d'Ivoire (resolutions 1528 (2004) and 2062 (2012)), the Democratic Republic of the Congo (resolutions

1291 (2000) and 2053 (2012)), Guatemala (resolution 1094 (1997)), Iraq (resolutions 1500 (2003) and 2061 (2012)) and Liberia (resolutions 1509 (2003) and 2008 (2011)).

20. Specific attention was paid to the issue of women, peace and security by the Security Council in its resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009) and 1960 (2010), in which it called for increased representation of women at all decision-making levels and the establishment of gender-sensitive mechanisms for the prevention, management and resolution of conflict, including in justice and security reform processes. Likewise, the Council established monitoring and reporting procedures on grave child rights violations in resolutions 1612 (2005), 1882 (2009) and 1998 (2011).

21. In its resolution 18/7, by which it established the mandate of the Special Rapporteur, the Human Rights Council included the promotion of the rule of law as one of the aims of the implementation of a comprehensive approach to transitional justice. In the twelfth preambular paragraph of that resolution, the Council emphasized the importance of:

> "A comprehensive approach incorporating the full range of judicial and non-judicial measures, including, among others, individual prosecutions, reparations, truth-seeking, institutional reform, vetting of public employees and officials, or an appropriately conceived combination thereof, in order to, inter alia, ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law in accordance with international human rights law."

22. In its resolution 19/36, on human rights, democracy and the rule of law, the Council again emphasized the relevance of transitional justice to the strengthening of the rule of law. In paragraph 9 of that resolution, the Council stressed the need for the international community to assist and support countries that were emerging from conflict or undergoing democratization, as they might face special challenges in addressing legacies of human rights violations during their transition and in moving towards democratic governance and the rule of law. It also drew a specific link between democracy, the rule of law and the eradication of impunity, mentioning specifically the principles of the supremacy of law and of equal protection.

B. Contributions of transitional justice to the rule of law

23. The conviction that transitional justice can contribute to the rule of law is deeply entrenched, as demonstrated in the aforementioned texts. It is useful to analyse the specific forms that those contributions have taken. What follows is not an exhaustive categorization of the ways in which those contributions can take place, or of relevant cases, but is intended to illustrate (and begin to classify) them. This initial presentation is organized in terms of the distinctive contribution that each of the pillars of the mandate can make to strengthening the rule of law and, within those, the points are organized in an approximate ascending order of generality. As can be seen from the present report, these distinctions are largely analytical and therefore must be considered in conjunction, given that the four measures under the mandate share some common fundamental goals and are mutually supportive and their effects overlapping.

I. Truth-seeking mechanisms[5]

Exposing and removing compromised personnel

24. The most immediate and specific contribution that transitional justice measures can make to strengthening the rule of law is to expose and to help to remove public officials involved in violations of rights (those who violate the most basic tenet of the rule of law: the idea that power is constrained by means of laws).

25. Various truth commissions have attributed responsibility (which is not the same as criminal culpability) for human rights violations, either by omission or commission, to officials in various branches of government and at various levels of seniority, and have established the grounds for their resignation or removal. For example, the Commission on the Truth for El Salvador highlighted what it termed the "appalling submissiveness" of the judiciary (S/25500, annex, p. 172) and recommended the resignation of the Supreme Court justices.

Providing an analysis of security and justice sector failures and making recommendations for their reform

26. Many truth commissions have paid significant attention to the shortcomings of the judicial, security and other official sectors responsible, by action or omission, for failures of the rule of law, which, according to their own analyses, resulted in serious human rights violations. The independence of the successful truth commissions to date has made these accounts much more credible than those produced by private or political parties, and the particular circumstances under which truth commissions are typically formed — moments in which societies are endeavouring to reformulate their social contracts — provide an unparalleled platform for highlighting the relevance of principles, not only in the overall constitution but also in the daily practice of security and justice institutions.

27. In addition to pointing out the presence of compromised personnel, truth commissions have also highlighted dysfunctionalities of security and justice institutions and have made recommendations for their reform. Some of those dysfunctionalities are structural. A case in point is the report of the Guatemalan Historical Clarification Commission, which contains not only a thorough historical overview of State institutions, including the judiciary and the security services, but also far-reaching proposals for their reform. The Commission mentions the absence of adequate budgets for the judiciary, the excessive bureaucratization, the insufficient number of judges, the lack of defence lawyers, the deficient training of its members and the numerical deficiency of courts as some factors that impeded the efficient operation of the judicial system.[6]

[5] Truth-seeking may be entrusted to various bodies or members of society. The Special Rapporteur concentrates herein on truth commissions as the primary vehicle for truth-seeking and truth-telling in times of transition.

[6] See Comisión de Esclarecimiento Histórico, *Guatemala: memoria del silencio*, vol. 3 (Guatemala City, F & G Editores, 1999), p. 114. Available from http://shr.aaas.org/guatemala/ceh/mds/spanish/toc.html.

Promoting access to justice

28. Several truth commissions have recommended increasing the efficiency of the justice system and the accessibility of courts. The Timorese Truth, Reception and Reconciliation Commission highlighted that a fair, professional, accessible and effective judicial system was a cornerstone of establishing the rule of law,[7] while similar recommendations were made by the Truth and Reconciliation Commission of Liberia.[8] In Guatemala, the Commission pointed out that the geographical distance of courts from those in the countryside, linguistic barriers and cultural differences compounded other deficiencies of the judiciary.[9]

Promoting reforms to increase the independence of the judiciary[10]

29. Truth commissions have also made recommendations concerning the independence of the judiciary, suggesting that it can be strengthened by building firewalls between the judiciary and other State powers. This can be accomplished, in part, by giving the judicial system more administrative and budgetary autonomy and by reducing the likelihood that appointments to high judgeships are the result of partisan politics. It is equally important to increase the individual independence of judges, especially lower-court judges, who may remain beholden to their superiors within the judiciary. Such independence can be promoted through the establishment of a tenured judicial career in which the appointment, promotion and dismissal of individual judges does not depend on following the perceived preferences of superior-court justices. This would be aided by, among other measures, changes in the evaluation processes of judges. Recommendations of this sort were made by the truth commissions in Chile, El Salvador and Guatemala.[11]

30. The concern with judicial independence is not peculiar to Latin American truth commissions. The Truth and Reconciliation Commission of Sierra Leone unequivocally highlighted that the starting point in establishing the rule of law was the creation of an independent, impartial and autonomous judiciary.[12] In the case of the Timorese Truth, Reception and Reconciliation Commission, it argued that an independent, functioning judicial system was essential to securing the rule of law, that the independence of the judiciary from Government policy had been compromised and that the judicial system had failed to protect the basic human rights of those accused through due process.[7]

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[7] *Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor*, part 11, p. 16. Available from http://etan.org/news/2006/cavr.htm.

[8] See vol. 2, p. 384, of the final consolidated report. Available from http://trcofliberia.org/reports/final-report.

[9] Comisión de Esclarecimiento Histórico, *Guatemala*, vol. 3, p. 116.

[10] On guarantees of judicial independence, see also the report of the Special Rapporteur on the independence of judges and lawyers (A/HRC/11/41), paras. 14-84.

[11] See, for example, Comisión de Esclarecimiento Histórico, *Guatemala*, vol. 3, pp. 113-114 and *123-124, and vol. 2, chap. 4, of the report of the Chilean* National Commission on Truth and Reconciliation, "Behavior of the courts toward the grave human rights violations that occurred between September 11, 1973 and March 11, 1990" (Notre Dame, Indiana, University of Notre Dame Press, 1993), pp. 860-862.

[12] See vol. 2, p. 141, of the Commission's final report. Available from www.sierra-leone.org/TRCDocuments.html.

Laying the groundwork for the implementation of other rule of law measures

31. Many countries in which transitional justice measures are implemented, and not just low-income developing countries, suffer from resource or capacity constraints and from various forms of institutional weaknesses. These deficits, whether or not income-related, put a premium on the effective utilization of the judicial and non-judicial resources inevitably consumed by the implementation of rule of law reform measures. In any case, all transitional justice measures involve making difficult choices, including where to focus judicial investigations and how to select cases for prosecutions; which institutions to vet, at what levels and for what type of abuses; and which violations should trigger reparations benefits and at what levels to compensate victims. Having a comprehensive view of the context in which violations took place, the strengths and weaknesses of the institutions that caused or permitted those violations and the demographic and social profile of the victims, including their needs and preferences, allows for the development of more targeted and efficient responses. The work of truth commissions often provides a basis for attaining such a comprehensive view. This is an example of the possible interrelationship between the various transitional justice measures, on which further information is provided in section V.

Making victims visible, and enabling their participation

32. Systematic violence and rights violations are often accompanied by, and, in any case, leave in their wake, pernicious forms of marginalization. This is especially true when violence and violations target particular groups defined on the basis of gender, ethnic, national, religious or even geographical or class factors.[13] Under such circumstances, victims tend to disappear from public awareness and discourse, and the violations and conflict are often discussed as if they affected primarily infrastructure and the economic interests of elites. Truth commissions (especially since the trend emerged for them to make use of public hearings) have often provided a formidable instrument to air the stories of victims, to clarify some patterns of their victimization and to highlight the interrelated forms of marginalization to which they are frequently subjected. In short, truth commissions help to give voice to victims, both individually and as groups. The possibility of exercising voice, especially in public debates, is not irrelevant to the strengthening of the rule of law, as the Special Rapporteur will explicitly argue in section V. This contribution is particularly relevant for women, children, ethnic minorities and indigenous peoples, who are often either the special targets of violence or experience it distinctly. The Special Rapporteur will endeavour to strengthen trends in transitional justice that increase the potential to respond to various forms of marginalization.

Catalysing debates about the proper understanding of the rule of law

33. Truth-telling and the discussions that it generates may make an important contribution to the establishment of the rule of law precisely by querying the understanding of what the ideal of the rule of law itself requires from those who operate the judicial system. Both in Chile and South Africa, for example, attempts to

[13] The Special Rapporteur will mainstream concerns about gender and minorities throughout the present report, in the conviction that the topic is of relevance for each measure under consideration.

understand how otherwise honest judges could have failed so manifestly in their fundamental task of distributing justice led the truth commissions in both countries to criticize the then prevailing understanding of the rule of law among judges. This was an understanding that emphasized the formal aspect of the rule of law, an understanding that in reality conveniently unburdened judges from exercising their judgement about the legitimacy of their own roles within legal systems of dubious to no legitimacy. The division of labour between politicians and judges that this understanding established allowed judges to think of themselves as mere enforcers of laws for which they themselves bore no responsibility. While this holds true in a sense (both Chile and South Africa maintained a separation of power of sorts), it is never the case that judges have absolutely no discretion in either the application or the interpretation of the law that binds them.

34. The Chilean National Commission on Truth and Reconciliation blamed judges for conceding too much latitude to administrative officials by consistently interpreting laws in the way that was most favourable to them (for example, invoking the principle of the separation of powers in order not to examine the reasons adduced by the executive to imprison or even exile people under state-of-siege provisions), which contrasts with the "excessive rigor with which the courts adhered ... to formal legality in assessing the proof brought against [other] perpetrators", a formalistic zeal that, according to the Commission, sometimes "prevented [the courts] from applying the appropriate sanctions".[14]

35. The South African Truth and Reconciliation Commission shares the assessment of its Chilean counterpart of the role that a purely formalist understanding of the rule of law played in sustaining an oppressive regime: "The appearance of judicial independence and adherence to legalism under the guise of 'rule by law' serves as a powerful legitimating mechanism for the exercise of governmental authority".[15] It also insists, however, that:

> "There needs to be substance to the notion of judicial independence, otherwise the courts will be seen as the mere obedient servants of the other branches of government. It is precisely this 'space', available to the judiciary and to lawyers, which can be legitimately and legally used to preserve basic equity and decency in a legal system."[16]

36. Before examining the contribution that other transitional justice measures can make to strengthening the rule of law, the Special Rapporteur reiterates that the realization of the potential contributions attributed to the aforementioned truth-seeking mechanisms depends on the implementation of other transitional justice measures.

2. Vetting and other measures of institutional reform that aim at guaranteeing non-recurrence

37. Notwithstanding the contributions that truth commissions have made to understanding the failures of security and justice systems that led either directly or indirectly to massive human rights violations, and the wisdom of some of their

[14] See vol. 1, p. 120, of the Commission's final report.

[15] Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report*, vol. 4 (London, Macmillan Reference Limited, 1998), p. 105.

[16] Ibid., p. 100.

recommendations, the fact remains that insight is not the same as transformation. Both analysis and specific action are required. Truth commissions, as temporary bodies with limited attributions and powers, are not responsible for the implementation of their recommendations. The Special Rapporteur, consistent with the resolution that created his mandate, which calls for a comprehensive approach to truth, justice, reparations and guarantees of non-recurrence, emphasizes that truth-seeking measures alone, however important they may be, do not exhaust the rule of law agenda in times of transition.

38. The idea of ridding institutions of abusers and collaborators in the aftermath of conflict or authoritarianism has a long (albeit not particularly distinguished) history.[17] Massive purges after periods of conflict are familiar all over the world, but that model should not be followed if one of the aims is to strengthen the rule of law. Vetting involves formal processes to screen the behaviour of individuals and assess their integrity on the basis of objective criteria, so as to determine their suitability for continued or prospective public employment.[18]

39. To sketch some of the crucial design variables in vetting programmes,[19] variables with regard to which different countries have adopted different positions, the Special Rapporteur notes:

(a) Vetting programmes have differed in terms of their targets. Choices must be made both about the institutions where vetting will be applied and the positions within those institutions that will be subject to screening;[20]

(b) Programmes differ also in terms of the screening criteria. It must be asked what kind of abuses, precisely, the system is designed to root out;[21]

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[17] See, for example, the papers in part II of Jon Elster, ed., *Retribution and Reparation in the Transition to Democracy* (Cambridge, United Kingdom of Great Britain and Northern Ireland, Cambridge University Press, 2006).

[18] According to the Secretary-General in his report on the rule of law and transitional justice in conflict and post-conflict societies, vetting usually entails a formal process for the identification and removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary (S/2004/616, para. 52). See also the Office of the United Nations High Commissioner for Human Rights publication on vetting programmes, available from www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf.

[19] See Alexander Mayer-Rieckh and Pablo de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York, Social Science Research Council, 2007).

[20] More countries have established vetting programmes for sectors of the armed and police forces than for the judiciary. Germany and Greece have also vetted universities. Proposals to vet sectors of the news media and other professions were not uncommon in the aftermath of the transitions in Eastern and Central Europe. Of course, many countries, including those mentioned here, have used vetting processes for some electoral and other Government offices.

[21] The range here is also broad: in Eastern and Central Europe, the effort was to identify collaboration with former secret services (interpreted differently in the various countries). Other countries have sought to identify participation in violations of human rights. In Poland, the vetting law in fact does not seek to impose a penalty for past collaboration with the former secret services but rather for lying about it. See, for example, Roman David, *Lustration and Transitional Justice* (Philadelphia, Pennsylvania, University of Pennsylvania Press, 2011).

(c) Programmes also make different decisions about the types of evidence admissible in the process and, importantly, about the criteria for making determinations;[22]

(d) Not all programmes are the same in terms of the sanctions that they impose; even dismissals can take place in many ways (beginning with a relatively mild sanction involving affording someone the opportunity to resign without disclosing his or her participation in behaviour considered abusive). Vetting sanctions can involve different degrees of publicity and prospective limitations in seeking employment in various sectors in the future;

(e) Lastly, but importantly from a rule of law perspective, programmes differ in their establishment of review or appeals mechanisms.

40. Of all transitional justice measures, vetting has lent itself most to political manipulation. This can be explained by various factors. Vetting usually involves many cases; vetting bodies operate less publicly than truth commissions and, as administrative bodies, less publicly than court procedures; and vetting also determines access to State power and resources. Accordingly, it is particularly important to design and implement vetting programmes scrupulously, heeding exacting procedural standards, in consultation with civil society, and with as much transparency as possible, while ensuring the confidentiality to which both those who are screened and potential victims are entitled.

41. Vetting programmes that satisfy these requirements can make important contributions to the rule of law in the aftermath of gross violations of international human rights law and serious violations of international humanitarian law. These are fundamentally of three related kinds:

(a) Removing compromised personnel from the security and justice sectors spares victims and others from having to deal with those who abused them when they seek State services to which they are entitled;

(b) Removing compromised personnel may dismantle networks of criminal activity that, among other things, may hamper reform processes;

(c) Beyond the brute fact of repeopling institutions, as important as this might be, vetting measures can contribute to the rule of law through their signalling function: they announce the willingness of institutions and their leaders to commit themselves to fundamental rights norms in whatever decisions they make concerning appointments, promotions and dismissals.

42. The importance of staffing changes in crucial rule of law institutions notwithstanding, such changes will not be sufficient to guarantee that violations will not recur unless they are accompanied by deeper structural reforms. Vetting should properly be considered to be one part of those broader reforms. On the side of the judiciary, they relate to the adoption of some of the abovementioned measures. They include increases in the budgets of the justice sector, the location of courts, the availability of legal aid and of either interpretation services or the inclusion of other languages for the operation of courts; changes in the processes of appointing and promoting judges, prosecutors and judicial officers; the assignment of court cases according to objective criteria, and the rationalization of systems of court

[22] As administrative procedures, vetting programmes work on the balance of probabilities rather than proof beyond any reasonable doubt.

administration; the strengthening of due process guarantees, witness protection programmes, limits on pretrial detention; improvements in evidence-gathering measures and limiting reliance on confessions; modernization of codes, including the typification of various forms of human rights abuses as crimes under national legislation; and the explicit incorporation of international human rights and humanitarian law obligations into domestic legislation. On the side of the security forces, broader reforms include disbanding groups heavily involved in illegal or irregular behaviour; rationalizing forces (a frequent problem in both authoritarian and post-conflict countries where typically there is a proliferation of security bodies with both inconsistent and/or overlapping mandates); strengthening civilian oversight mechanisms; improving the gender and ethnic representativeness of the forces, especially in positions of authority (a staffing issue that goes beyond considerations normally in the domain of vetting programmes); increasing the transparency of security-related budgets; and differentiating between military and policing functions.

3. Reparations

43. Reparations have come to occupy a special place in transitional processes, at least in part because they are the transitional justice measure that arguably has the greatest potential to make an immediate difference to the life of victims. Most recent transitional countries have adopted administrative, non-judicial programmes to distribute a variety of benefits (material and symbolic, and individual and collective) to victims as parts of their transitional justice policies.[23]

44. Here again, there are significant variations by country, including:[24]

(a) Programmes differ in their degree of comprehensiveness, that is, in the violations that trigger access to benefits. Most programmes have concentrated on a fairly narrow set of violations of largely civil and political rights, such as extrajudicial executions, disappearance, illegal detention, torture and, increasingly, forms of sexual violence;

(b) Programmes differ in their degree of complexity, that is, in the kinds of benefits that they distribute. The trend is towards programmes of greater complexity, which provide monetary compensation and other kinds of benefits such as access to medical services and educational and housing support, in addition to symbolic benefits such as official apologies and the renaming of buildings and public spaces;

(c) Different programmes adopt different distribution modalities for their compensatory benefits, and some involve the apportioning of those benefits among family members. All other things being equal, experience suggests that distributing monetary benefits in terms of a pension system rather than in single lump sums is beneficial. There is some evidence that apportionment has beneficial consequences for women and children;[25]

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[23] See, for example, Pablo de Greiff, ed., *The Handbook of Reparations* (New York, Oxford University Press, 2006).

[24] Ibid., and *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (United Nations publication, Sales No. E.08.XIV.3). Available from www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf.

[25] See, for example, Ruth Rubio-Marín, ed. *The Gender of Reparations* (New York, Cambridge University Press, 2009).

(d) Programmes also vary significantly in their degree of munificence, that is, in the magnitude and the quantum of benefits that they offer.

45. Reparations programmes can contribute to strengthening the rule of law in the following ways:

(a) Reparations constitute a form of recognizing the rights of victims and the corresponding State obligations. In 1928, the Permanent Court of International Justice, in the *Factory at Chorzów* case, argued that it was a principle of international law that the breach of an engagement involved an obligation to make reparation in an adequate form.[26] Article 2 (3) of the International Covenant on Civil and Political Rights also establishes the duty to provide effective remedy for violations of the rights under the Covenant. Providing reparations to victims therefore constitutes the satisfaction of one of their rights and a way of satisfying a series of State obligations, including to provide effective remedies and to ensure fair and equal treatment under the law;

(b) Reparations are not merely a manifestation of particular rights but can enable the exercise of other rights. The restitution of citizenship and other rights, including a particular legal status, can remove severe constraints on the exercise of rights and opportunities. Having an unjustified criminal record expunged, for example, can have profound effects on the future opportunities of individuals. Similarly, material reparations can make the difference between being able to resume education and training or being condemned to a life of deprivation. The point is not simply about lives of different quality (as important as this is for individuals and in the aggregate) but about the prospects of victims exercising rights in general in a way that gives meaning to notions of equality under the law;

(c) When there is a collective or group dimension to the violations or of conflict, as is usually the case with gross violations of human rights and serious violations of international humanitarian law, some forms of which affect gender, ethnic, religious, or other groups in particular, massive reparations programmes can have an inclusive redress effect that strengthens the notion of the generality of law and the protections that it affords.

4. Justice

46. Considering their particularly rich history, the Special Rapporteur highlights below some recent relevant experiences that illustrate the contributions that prosecutions can make to strengthening the rule of law.

47. Contexts in which gross violations of human rights and serious violations of international humanitarian law have occurred pose particular challenges for prosecutions, both in theory and in practice. Indeed, for various reasons, including the number of perpetrators and scarcity of resources, capacity and will, in addition to the fact that in many transitions the balance of power between the predecessor regime and the successor regime makes prosecutions a threat to the transition, in most cases only a fraction of those who bear responsibility for perpetrating outrageous acts are ever even investigated.

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[26] *Case concerning the Factory at Chorzów (Germany v. Poland)*, Indemnity, 1928, PCIJ, Series A, No. 17, p. 47.

48. While prosecutions in domestic courts remain in principle favoured over international courts considering their lower costs and higher local impact, participation and ownership, precisely owing to reasons relating to the fragility of institutions in many post-conflict and post-authoritarian settings, alternatives to domestic prosecutions have been pursued with some success.

49. The two ad hoc international tribunals established by the Security Council to try cases stemming from the conflicts in the former Yugoslavia and Rwanda, in 1993 and 1994 respectively, are winding down their operations. The former has indicted 161 persons and concluded 126 proceedings, leading to 64 convictions, 13 acquittals, 13 transfers to national jurisdictions and 36 withdrawals of indictments.[27] The latter has indicted 92 persons and completed 74 cases, with 64 convictions and 10 acquittals. It has transferred four cases to national jurisdictions and has withdrawn two indictments.[28]

50. The International Criminal Court issued its first conviction, against Thomas Lubanga of the Democratic Republic of the Congo, on 10 July 2012 and issued its first reparation decision, in the same case, on 10 August.

51. Hybrid tribunals, thought to combine some advantages of domestic prosecutions (such as proximity, legacy and possibility of participation) and to mitigate some disadvantages of international tribunals (such as distance and costs)[29] are also producing results, with the Special Court for Sierra Leone having convicted the former President of Liberia, Charles Taylor, on 26 April 2012. The case is now under appeal. The Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia upheld the conviction by the Trial Chamber of Kaing Guek Eav (alias "Duch") on 3 February 2012.

52. Courts in Bosnia and Herzegovina continue to conduct proceedings in cases of war crimes and crimes against humanity stemming from the 1992-1995 conflict. Criminal reports have been filed with various police agencies against 5,895 suspects. A total of 1,285 investigations are currently under way, while the trials of 412 perpetrators have been completed.[30] The country's complex judicial structure and intermittent political pressures notwithstanding, there are hopes for the implementation of the National Strategy for War Crimes Processing adopted in December 2008. The Strategy, the implementation of which is spearheaded by the State-level Court of Bosnia and Herzegovina — a hybrid institution with international judges and prosecutors serving alongside their counterparts from Bosnia and Herzegovina — envisages the completion of all cases within 15 years of its adoption.

53. Given the topic of the present report, much more important are domestic prosecutions, which receive less attention internationally, even though two countries, in particular, have made significant strides on this front. As at August 2012, 1,932 individuals had been named in criminal proceedings for crimes against humanity in Argentina, of whom 1,597 had been or were currently under investigation (319 had

[27] See www.icty.org/sections/TheCases/KeyFigures.

[28] See www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx.

[29] See *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (United Nations publication, Sales No. E.08.XIV.2). Available from www.ohchr.org/Documents/Publications/HybridCourts.pdf.

[30] Organization for Security and Cooperation in Europe Mission to Bosnia and Herzegovina trial monitoring programme, war crimes proceedings statistics, 31 May 2012.

died and 16 been declared incompetent). Of the total, 272 have been convicted and 20 acquitted. In 76 per cent of the convictions, the courts have handed down prison terms of 16 years or more, with a large number of life sentences imposed.

54. Beyond numbers, there are at least two facts to emphasize about these efforts: first, the cases involve not only members of the military and the police, but also civilians, including civilian members of the intelligence services of the armed forces, and, importantly, members of the judiciary and officials of the de facto Government. At least 27 former judges, prosecutors and defence attorneys have been charged with complicity or participation in human rights violations.

55. Second, great progress has been made in opening investigations into gender and sexual crimes, in some cases against high officers, leaving aside that these crimes open liability only to those that commit them directly.[31]

56. Chile, similarly, has impressive numbers to show. Since 2000, 771 officials have been tried and convicted in cases relating to disappearances and executions. A further 31 died before their cases had been finalized. An additional 1,446 cases are continuing. This means that a staggering 76 per cent of victims of disappearances and executions either have or have had a prosecution initiated on their behalf.[32] While it is true that it has taken decades in both countries to reach this stage and that there are abiding problems with delays and the actual serving of sentences, among other difficulties, these are certainly experiences that merit further analysis.

57. The case for the contribution made to the rule of law by criminal justice for gross violations of human rights and serious violations of international humanitarian law hardly requires elaboration. Nevertheless, it must be stated that, first, criminal prosecutions in cases of this sort give life to the principle of the sovereignty of law and of the related principle of equality. No one, regardless of rank or status, is above the law. Second, at a more practical level, given the complexities of criminal trials for systematic abuses, these processes help to develop transferable skills that contribute to strengthening the overall capacity of judicial systems.

V. Aggregate effect on the rule of law of a comprehensive transitional justice policy

58. For clarity, the Special Rapporteur has presented the potential contributions of each of the four elements of his mandate separately, while stressing that the distinctions are purely analytical and pointing out that there are functional overlaps between the measures (for example, the reminder that, although truth commissions can make recommendations on a broad range of issues, those recommendations involve the implementation of the other measures that are usually considered part of a holistic transitional justice policy).

59. In creating the mandate of the Special Rapporteur, the Human Rights Council emphasized the importance of a comprehensive approach to the four elements. The Special Rapporteur, in his first report to the Council and elsewhere, has articulated a position on the links between the four elements. He does not summarize those

[31] See www.cels.org.ar/wpblogs/estadisticas and Centro de Estudios Legales y Sociales, *Derechos humanos en Argentina: informe 2012* (Buenos Aires, Siglo Veintiuno Editores, 2012).

[32] See www.icso.cl/observatorio-derechos-humanos.

arguments herein, but uses those that are particularly relevant to the discussion about the relationship between transitional justice and the rule of law. The argument explains and systematizes the effects attributed to the measures in section IV.

60. The four elements of the mandate (truth, justice, reparations and guarantees of non-recurrence) are not simply a random collection of efforts. They are related to one another, both conceptually and empirically, which is one of the reasons that the tendency of some Governments to trade off some against the others is both unacceptable and unlikely to succeed. The four measures can complement one another, helping to compensate for the deficits that each faces vis-à-vis the immensity of the task of redressing gross violations of human rights and serious violations of international humanitarian law.

61. Furthermore, at the conceptual level, they can be seen to be part of a whole by virtue of sharing some goals. These goals happen to be important for the promotion of the rule of law (which is indeed one of the final goals of transitional justice, on this conception) and to efforts to achieve justice by means of formal systems of law. The four measures can be seen as instruments for providing recognition to victims: all transitional justice measures are designed to provide recognition to victims, not only of their stories and the suffering that they have endured, but also, and crucially, of their status as bearers of rights. They can also be seen as means of promoting trust, both horizontally, between victims and others, and, importantly, vertically, between victims and State institutions.

62. Both recognition and trust are preconditions for and consequences of the effort to establish formal systems of justice. Legal systems perforce operate on the basis of creating legal subjects whose definitional basis is the possession of rights (and obligations). Similarly, no legal system can operate without a certain degree of trust: in the absence of total (or totalitarian) surveillance, criminal legal systems must rely upon citizens' willingness to report both crimes that they witness and crimes that they suffer. This presupposes minimal trust in police investigations, in the efficiency of the court systems, in the honesty and independence of judges and in the strictness (but perhaps also the simultaneous humaneness) of the prison system, among other things.

63. Legal systems, however, do not merely rest upon pre-existing levels of recognition and trust: they also catalyse them. The extension of some rights to legal subjects has historically unleashed familiar struggles for recognition leading to the extension of the same rights to others (in the name of equality, for example), and to the extension of the legally recognized catalogue of rights (in the name of democratic legitimacy, among other reasons). Similarly, legal systems, by accumulating a record of successfully mediating social conflicts, do not rest upon established expectations but create and stabilize expectations in new areas.

64. The potential of transitional justice to accomplish these goals depends on two social mechanisms that are fundamental to a robust understanding of the rule of law: first, the ability of the various measures to affirm certain basic norms, which happen to be the very same norms that are fundamental to the rule of law. Recognition consists of the acknowledgment of basic rights, and trust is not the same thing as predictability because, otherwise, systematically corrupt and authoritarian Governments would be paragons of trustworthiness. Rather, trust rests on the expectation of commitment to action on the basis of shared norms.

65. Second, transitional justice measures work, insofar as they do, by virtue of their potential to catalyse processes for the formation of some groups and the disbandment of others,, also on the basis of norms (articulation and disarticulation). That the measures have disbandment capacity is clear from the effects of vetting, prosecutions and truth commissions, to the extent that there are groups that can operate only with the advantage of being in the shadows. That the measures have formation capacity is evidenced by the creation of a plethora of civil society organizations wherever the measures are placed on the public agenda of countries undergoing transitions.

66. Norm affirmation and incentives to organize or reorganize civil society are two crucial social mechanisms through which a comprehensive approach to transitional justice contributes to the rule of law, as it is robustly understood. The measures rest upon but also strengthen regimes of rights where it is understood that individuals are rights-bearers and that they can organize themselves in order to raise claims against one another, and crucially, against the institutions of the State. In this way, transitional justice contributes to the overcoming of conditions under which persons are mere supplicants, dependent on the will or grace of the authorities. They become claimants of rights and participants in the processes by which the content, application and strength of the law are defined. Dealing with the crimes of the past, then, is instrumental for the rule of law.

67. No country can claim to respect the rule of law if the violation of its most fundamental norms remains inconsequential. This is why rule of law reforms cannot be wholly prospective and ignore the past. It is not that transitional justice measures are in essence past-oriented, but there is no such thing as an entirely new beginning. Wherever transitions take place, political space is shared by those whose fundamental rights were violated and those whose, by chance, were not. Wherever systematic rights violations have taken place, there are no such things as rights, strictly speaking, whether for former victims or for anyone else, showing that the topic is of concern not just for victims. Trusting the rule of law and giving force to fundamental rights, in all spheres, require ensuring proper redress for past violations, given that the confidence of victims and of others who might be victimized (i.e. everyone in a system in which systematic rights violations are hidden or ignored as a thing of the past) rests upon evidence that power is effectively regulated, that people are treated equally and that they have recourse when that is not the case. Institutions are created by human beings for whom history matters. Accordingly, the strength of the rule of law in the present and its prospects for the future lies in ensuring that the past is not ignored.

VI. Need for transitional justice measures compliant with the rule of law

68. To contribute to the strengthening of the rule of law, the design, establishment and functioning of all transitional measures should comply with all its requirements, including all procedural guarantees of fairness.

69. To illustrate some salient challenges, taking the measures in an order that reverses that in which they have been presented herein, prosecutions in times of transition have had to confront questions about the retroactive application of law, which violates the principle of *nullum crimen sine lege, nulla poena sine lege*

(which prohibits a criminal conviction when there is no prior law criminalizing the act). Country experience suggests that this can be addressed by appealing to international commitments that countries may have made, by appeal to peremptory norms (*jus cogens*) or to substantive and procedural laws endorsed by the predecessor regime, by requesting the independent and impartial courts of the successor regimes to pronounce themselves on the repeal of such laws by the abusive regimes or on the status of amnesties that they may have given themselves, or by finding loopholes in laws passed by predecessor regimes to authorize the violations, among others. The main point, however, is that, if criminal prosecutions and trials are to strengthen the rule of law, they cannot ignore questions of legality, and that their contribution to this end depends on the meticulous adherence to the requirements of due process, showing that everyone, even those suspected of the worst violations, is treated fairly by courts. While the legal grounding and procedural aspects of individual trials are important, so too is the distribution of the prosecutorial efforts. The principle of equal treatment should also be observed in the way in which prosecutions are distributed, especially if the violations took place in contexts in which group-based motivations might have been an issue. It is not a matter of seeking to track exactly group-based distribution of the violations, but to ensure that even-handedness also rules the initial selection of cases for attention by judicial systems.

70. Reparations programmes must also abide by principles of even-handedness and procedural fairness in their treatment of both categories of cases and individual applications. The choice of categories of violations that trigger access to reparations needs to be mindful of the initial distribution of violations and of patterns of victimization (another reason why having the sort of comprehensive information about violations that truth commissions typically gather is also useful for purposes of reparations). Discriminatory selectivity in this choice, in the determination of types and levels of benefits for various violations and in the processing of individual reparations applications can undermine the contribution that reparations can make to the rule of law. While progress has been made in the way in which reparations programmes deal with female victims of violations and conflict, much remains to be done.[33]

71. Vetting programmes may fall foul of the requirements of the rule of law in various ways. For example, they may interfere with the principle of equal access to public service or disregard the presumption of innocence if they end up taking the form of a purge, indifferent to questions about individual responsibility. In the case of the judiciary, questions may arise about security of tenure and, therefore, about independence. Generally speaking, the programmes must be mindful of issues relating to standards of evidence and ensure that appropriate appeals mechanisms are established to contest the determinations of the vetting bodies.[34]

72. Truth commissions are not judicial institutions and should not assume their functions. Although commissions can attribute responsibility, they should not arrogate the authority to make determinations concerning criminal guilt. Even within these limits, procedural fairness and the right to privacy of both alleged

[33] See, for example, Rubio Marín, ed., *The Gender of Reparations*, and the report of the Special Rapporteur on violence against women, its causes and consequences (A/HRC/14/22).

[34] See Federico Andreu-Guzmán, "Due process and vetting", in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention*.

perpetrators and even victims may be compromised. Insofar as possible, conferring a right of reply to every individual implicated before releasing the final report may safeguard the commission's work from accusations of partiality or disrespect for procedural fairness.[35]

73. While various countries have tackled many of these issues, the Special Rapporteur takes the opportunity to reiterate the importance of guaranteeing that transitional justice measures comply with rule of law requirements and stresses the need to systematize approaches to ensure that this is the case, a topic that he will take up in his future work.

VII. Conclusions and recommendations

74. **In the light of the continuing discussions about the rule of law by the General Assembly, the Special Rapporteur wishes to highlight the manifold contributions that transitional justice measures can make to strengthening the rule of law in countries that have implemented them and, on the basis of those experiences, to sound a cautionary note about the idea that gross violations of human rights and serious violations of international humanitarian law can be removed from the rule of law reform agenda.**

75. **All rule of law reform projects take place in societies with a specific history. Those in which the issue is of most concern are typically those in which gross violations of human rights and serious violations of international humanitarian law have taken place. Since there is no such thing as an entirely new beginning, the immediate effectiveness of rule of law reform and its future depend upon making rule of law institutions trustworthy. There is no case to be made about the trustworthiness of rule of law institutions that allow the violation of even the most fundamental rights to remain inconsequential.**

76. **Examples examined herein demonstrate that truth-seeking mechanisms may contribute to the rule of law by exposing and removing compromised personnel; providing an analysis of shortcomings of security, justice and other sectors, in addition to making proposals for their reform; laying the groundwork for the implementation of other rule of law measures; making victims visible and enabling the participation of marginalized groups and women; and catalysing debates about the proper understanding of the rule of law.**

77. **Vetting programmes may make an important contribution to the rule of law in the aftermath of gross violations of international human rights and humanitarian law in three fundamental and related ways: they can provide specific action and potential for transformation that complement the contribution of truth-seeking commissions; fulfil a signalling function; and express public commitment to fundamental rights in decision-making processes by removing compromised personnel and dismantling networks of criminal activity.**

[35] On some of these issues, see Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge, United Kingdom, and New York, Cambridge University Press, 2006).

78. **Reparations programmes contribute to the rule of law by recognizing victims' rights and States' duties; providing empowerment to victims and enabling them to exercise other rights, including claiming access to various State-provided benefits and services; by creating a sense of inclusion, in particular where the violations had a collective or group dimension, including gender; and, when the programmes are designed and operated equitably, by strengthening the principle of equality before the law.**

79. **Prosecutions have contributed to strengthening the rule of law by ensuring that perpetrators do not go unpunished, thereby demonstrating to society that justice is done and advancing visibility and norm affirmation for gender-related and sexual crimes, among others. Experience of prosecutions in the context of transitional justice is likely to build and strengthen the capacity of domestic judicial systems. This is crucial to successfully maintaining and consolidating the achievements of transitional justice measures, which are limited in time and scope.**

80. **The Special Rapporteur, consistent with his mandate, which calls for the adoption of a comprehensive approach that links its four pillars (truth, justice, reparations and guarantees of non-recurrence), emphasizes that the full potential contribution of transitional justice to the rule of law is realized only by the adoption of an approach that implements systematically its four elements.**

81. **The Special Rapporteur therefore calls upon all relevant actors to resist the tendency to think of the four measures as ones among which trade-offs can be made, or of transitional justice as a special form of justice, in particular a soft form of justice.**

82. **The Special Rapporteur wishes to highlight that country experiences of these measures suggest that a purely formalist understanding of the rule of law has been insufficient to prevent violations and that the notion of the rule of law to which transitional justice bodies have sought to contribute is a robust one that links it with human rights, governance and development and that asserts its relevance for peace and social cohesion, including gender equality and the absence of discrimination on any grounds.**

83. **The Special Rapporteur, while emphasizing the contributions that transitional justice can make to the rule of law, also affirms the importance of designing and implementing transitional justice measures in ways that comply with the underlying principles of the rule of law.**